

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN STEVENSON,

Defendant-Appellant.

UNPUBLISHED

December 27, 2007

No. 270380

Wayne Circuit Court

LC No. 05-012676-01

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and the trial court sentenced defendant to 45 months to 15 years in prison. For the reasons set forth below, we affirm.

Defendant contends that the prosecutor violated his rights when, during defendant's motion for a new trial, the prosecutor argued that the date of the offense was January 2005 when, during the trial, the prosecutor and defense counsel both proceeded under the assumption that the offense occurred in January 2004. It appears that the confusion arose because, in an initial interview, the victim stated that defendant raped him in January 2004. While the felony information states that the offense occurred in the winter of 2004, which could refer to late 2003/early 2004 or late 2004/early 2005, after trial, the prosecutor argued that the crime occurred in January 2005.

This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). As stated by this Court in *People v Higuera* 244 Mich App 429, 444; 625 NW2d 444 (2001), MCL 767.76 establishes that, "[a]n information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime."

Here, defendant has failed to show that he was prejudiced by the prosecutor's changed position about the date of the offense. Indeed, defendant was able to present an alibi defense at trial because he lived elsewhere in January 2004, a defense that would have been unavailable to him if the parties had correctly identified the date as January 2005. The jury convicted defendant despite his alibi, presumably on the strength of the victim's testimony about defendant's conduct.

Defendant has not shown that the outcome of the trial would have been different if the prosecutor argued during trial that the date of the offense was January 2005, particularly because, at that time, defendant lived in the house in Detroit with the victim.

Defendant contends that if the amendment to the date of the offense does not violate MCL 767.76, it violates his right to due process because his lack of notice regarding the details of the offense prevented him from forming a defense. According to the police report, the victim was born on September 13, 1993. The victim stated at trial that the offense occurred during the winter of 2004 and that during that winter he was 11 years old. The victim did not turn 11 until September 13, 2004, which means that if the rape did occur in the winter that the victim was 11, it must have happened in the winter of late 2004/early 2005. Furthermore, at the time of trial in March 2006, the victim was in the fifth grade. He testified that he was in the fourth grade when he was raped. Unless he was held back, which the evidence does not establish, the victim would have been in fourth grade in January 2005, not January 2004. Had defendant analyzed the testimony of the victim, it would have been clear that the victim was alleging that he was raped in January 2005. Accordingly, any confusion regarding the date of the offense was not the result of a lack of notice, but the result of defendant's poor trial preparation.

Defendant also claims that his counsel was ineffective for presenting an alibi defense for January 2004 and for failing to request a more specific date of the offense. In order to prevail on an appeal based on ineffective assistance, a defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

Were we to find that defense counsel's performance was deficient because he failed to ask the trial court to order the prosecutor to name the specific date of the offense, *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986), we would nonetheless hold that defendant has failed to show prejudice. Like defense counsel, the prosecutor did not realize until after trial that the actual date of the offense was January 2005. Consequently, the jury only heard evidence relating to January 2004, at which time defendant was not living in Detroit. Despite being under the impression that the rape occurred in January 2004, while defendant was enrolled in school in Pittsburgh, the jury apparently found the victim's testimony so credible that it found defendant guilty despite his alibi. Had defense counsel discovered the true date of the offense, defendant has not shown that he could have presented a more persuasive defense than his unsuccessful alibi. As a result, defendant has failed to show that he was prejudiced by counsel's performance.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly